No. 97-1008

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

CAROLYN C. CLEVELAND,
Petitioner,

v.

POLICY MANAGEMENT SYSTEMS CORP., *et al.*,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

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This brief of the Association of American Railroads is filed with the consent of the parties, the letters expressing consent having been filed with the Clerk of the Court.

STATEMENT OF INTEREST OF AMICUS CURIAE [1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 76 per cent of the rail industry's line haul mileage, produce 93 per cent

[1] No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

of its freight revenues, and employ 91 percent of rail employees. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest.

This case arises under the disability benefits provisions of the Social Security Act (SSA), 42 U.S.C. § 423, and the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq*. Though railroads and their employees are covered by the latter statute, they are not covered by the former.[2] Nonetheless, railroads frequently face the issue now before this Court in situations analogous to the case at bar.

Railroads and their employees are covered by the Railroad Retirement System which, though similar to Social Security, differs in some significant ways.[3] In addition to providing old age pensions, the Railroad Retirement System, as does Social Security, also provides disability benefits to qualifying employees.[4] Depending on the nature of the disability suffered, rail employees may qualify for one of two kinds of disability benefits. Employees who are unable to work at any regular employment may qualify for total and permanent disability benefits.[5] This benefit is analogous to the disability benefit available under Social

[2] A railroad employee would be eligible for Social Security benefits if qualifying on the basis of sufficient employment outside the railroad industry.

[3] Railroad Retirement Act of 1974 (RRA), 45 U.S.C. § 231 *et seq*. There are two aspects of Railroad Retirement, known as Tier I and Tier II. While Tier I is considered to be a Social Security equivalent, there are differences: for example, railroad retirees with sufficient years of service can qualify for a pension at an earlier age than can Social Security beneficiaries. Tier II provides an additional benefit to railroad retirees, having no equivalent in the Social Security System.

[4] 45 U.S.C. § 231a.

[5] 45 U.S.C. § 231a(a)(1)(v). To qualify for a total and permanent disability annuity an employee must have at least ten years of service.

Security, and in evaluating eligibiilty for such benefit it is accepted practice to rely on the regulations promulgated by the Social Security Administration and cases arising under the SSA. *Bowers v. Railroad Retirement Board*, 977 F.2d 1485, 1488 (D.C. Cir. 1992); *Soger v. Railroad Retirement Board*, 974 F.2d 90, 92 (8th Cir. 1992). Even if not qualified for total and permanent disability benefits, employees who are disabled from working in their regular occupation on the railroad may qualify for an occupational disability, a special benefit not available to workers covered by Social Security.[6]

If a railroad worker's disability is the result of a work-related injury another source of compensation is available in addition to the RRA disability benefit. The injured worker also may seek compensation under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq*.[7] FELA is a negligence statute, enacted by Congress in 1908 to provide a remedy for railroad employees injured on the job.[8] Enacted at a time when the common law

[6] 45 U.S.C. § 231a(a)(1)(iv). To qualify for an occupational disability annuity an employee must have either twenty years of service, or must be 60 years old with ten years of service.

[7] The fact that a railroad employee is receiving disability benefits under the RRA does not preclude bringing a FELA action. Moreover, based on dicta in *Eichel v. New York Central R.R.*, 375 U.S. 253 (1963), several courts have ruled that the receipt of RRA disability benefits cannot be introduced for the purpose of offsetting a FELA award. *E.g., Green v. Denver & Rio Grande Western R.R.*, 59 F.3d 1029, 1033 (10th Cir.), *cert. denied*, 116 S.Ct. 565 (1995). Thus, rail employees often receive compensation for the same disability under both FELA and the RRA.

[8] FELA predates the no-fault workers' compensation statutes which subsequently were enacted by every state, as well as the federal government, and which provide insurance type benefits, on a no-fault basis, to employees within their jurisdiction. Today, the railroad industry is virtually the only one in which work-related injuries are compensated under a fault-based system. The Maritime industry, by virtue of 46 U.S.C. § 688, is the only other covered by FELA.

made recovery difficult for injured employees, FELA eliminated the defenses of contributory negligence and assumption of the risk, 45 U.S.C. §§ 53 and 54, and has been interpreted to embrace a relaxed standard of causation. *Rogers v. Missouri Pacific R.R.*, 352 U.S. 500 (1957).

When an injured employee's claim cannot be settled, FELA relies on lawsuits to resolve disputes over whether and how much compensation is due the worker from the railroad.[9] In 1997, for example, 8,086 FELA lawsuits were brought.[10] FELA permits employees to recover all damages suffered as a result of the injury, without any caps or limitation, including, upon proper proof, both past and future lost earnings.[11] Therefore, the degree to which a disability impairs an employee's ability to work and earn an income has a direct impact on the amount of damages, and can be hotly contested in the courtroom.[12] Large FELA verdicts are not atypical, and often include awards of hundreds of thousands of dollars for future lost wages.[13]

It is not uncommon for a FELA plaintiff to remain off the job through the time of trial, and subsequently, in-

[9] 45 U.S.C. § 56 authorizes FELA suits to be brought in either state or federal court.

[10] ASSOCIATION OF AMERICAN RAILROADS, 1997 CLAIM & LITIGATION REPORT 3-3 (Aug. 1998). ("CLAIM & LITIGATION REPORT"). This report contains data on AAR member railroads' FELA experiences compiled from annual surveys.

[11] *See Williams v. Missouri Pacific R.R.*, 11 F.3d 132 (10th Cir. 1993); *Schneider v. National Railroad Passenger Corp.*, 987 F.2d 132 (2nd Cir. 1993) (A jury award will not be deemed excessive unless it shocks the judicial conscience.)

[12] *See Sinclair v. Long Island R.R.*, 985 F.2d 74 (2nd Cir. 1993).

[13] From 1992 through 1997, there were 99 FELA verdicts of $1 million or more. CLAIM & LITIGATION REPORT at 2-8. *See e.g., Manes v. Metro-North Commuter R.R.*, 801 F. Supp. 954 (D. Conn. 1992), *aff'd*, 990 F.2d 622 (2nd Cir. 1993) (Over $1 million awarded for lost earnings and medical expenses.)

voking contractual or statutory rights, to seek reinstatement in his or her former position with the railroad. The attempt to return to the job sometimes occurs in the wake of the employee having vigorously asserted under oath, in a courtroom or deposition, his or her inability to ever work again. In some cases, the employee also will have applied for and received Railroad Retirement disability benefits, again on the representation of being unable to work. While efforts to rehabilitate are generally laudable, under these circumstances, often having paid the employee a large sum for future wage loss (or being legally obligated to do so), the railroad may resist the employee's effort to return to the job, arguing that some form of the doctrine of estoppel should serve to bar reinstatement. Because this Court's ruling may impact the rights of railroads in these circumstances, AAR and its members have a strong interest in this case.

STATEMENT OF THE CASE

Amicus adopts the statement of the case in the Respondent's brief.

SUMMARY OF THE ARGUMENT

The railroad industry has a long history with the issue raised by the case below. Employees who have testified under oath that they are permanently disabled in FELA suits, and/or who have made similar representations in order to collect Railroad Retirement disability benefits, often then attempt to regain their former positions with the railroad. This has been attempted by either invoking collective bargaining rights or, more recently, by alleging a right under ADA. In numerous cases, the courts (or arbitration panels), in order to preserve the integrity of the judicial process and to assure equitable results, have estopped claimants from seeking reinstatement where the claimants' prior sworn statements about their ability to work have been inconsistent with the facts alleged to support their right to employment.

The decision below should be affirmed because it represents a proper balance between promoting legitimate claims of workplace discrimination based on a disability and allowing courts the necessary flexibility to estop litigants from pursuing ADA claims that are clearly inconsistent with prior sworn representations. Requiring claimants who have previously sworn that they are permanently disabled from working to rebut a presumption that they cannot be a qualified individual with a disability will give judges a tool with which they can preclude use of the courts to pursue clearly inconsistent claims; at the same time, it should permit legitimate ADA claims to go forward when evidence can be proffered to demonstrate that the seemingly inconsistent representations are, in fact, reconcilable. This Court should be mindful of situations analogous to the case at bar where the ability to apply judicial estoppel is even more important, such as where the ADA claimant already has collected a substantial tort judgment as compensation for future lost earnings.

ARGUMENT

I. THE EXPERIENCE OF THE RAILROAD INDUSTRY SUPPORTS THE REBUTTABLE PRESUMPTION STANDARD ESTABLISHED BY THE FIFTH CIRCUIT FOR ADDRESSING ADA CLAIMS WHEN THE CLAIMANT HAS PREVIOUSLY SWORN THAT HE OR SHE IS PERMANENTLY DISABLED

The decision below simply stands for the unremarkable proposition that when persons seeking a benefit state under oath that, due to a disability, they are permanently unable to work, courts should operate under a presumption which, unless rebutted, holds them to their sworn representations. Notwithstanding the contention of Petitioner, and the United States, as *amicus*, that this ruling will undermine the purposes of both the SSA and ADA, the Fifth Circuit's decision strikes a proper balance between effectuating the purposes of those statutes and the need to preserve the integrity of the judicial process. The rebuttable

presumption standard does not preclude legitimate ADA claims: rather, it simply places an appropriately heightened burden on ADA claimants who previously have represented under oath that they are unable to work, requiring they produce evidence that their ADA claim is sustainable notwithstanding those prior sworn statements.

Even if this Court rejects the rebuttable presumption standard as inappropriate in this case, it should be mindful of situations which are analogous, albeit arising under different statutes, where the doctrine of judicial estoppel plays an especially important role. This Court must avoid a ruling which would undercut the ability of lower courts to apply judicial estoppel in other contexts where it is essential to preserve the integrity of the courts and achieve equitable results between litigants.

A. The Application of Judicial Estoppel in Railroad Cases

The doctrine of judicial estoppel has a long history in the railroad industry, often finding application in proceedings brought by former FELA plaintiffs. After a FELA case has been adjudicated, and regardless of the employee's degree of success, it is not uncommon for the employee to seek reinstatement to his or her job with the railroad. Frequently, this occurs notwithstanding the fact that the employee, and/or expert witnesses on his or her behalf, testified during the course of the FELA litigation that they are permanently disabled and unable to work again. *E.g.*, *United Transportation Union v. Atchison, Topeka & Santa Fe*, PLB No. 4901 (1993) (Eight days after entry of a judgement in a FELA case, which included an award of $125,000 for loss of future earning capacity, the employee sought to return to work.); *Mutrie v. CSX Transp., Inc.* NRAB Docket No. 43629 (1990) (Claimant attempted to return to work after steadfastly maintaining through his FELA trial that he was permanently disabled from working as a switchman.); *United Transportation*

Union and CSX Transp., Inc., PLB No. 3510 (1989) (Employee sought to return to work less than two months after a FELA trial in which two doctors testified on his behalf that he was unable to perform his duties as a brakeman and there was a "reasonable degree of medical certainty" that if he returned to work he would reinjure himself.); *Brotherhood Railway Carmen of the United States and Canada v. Chesapeake & Ohio Ry. Co.*, NRAB Docket No. 11204 (1988) (Claimant attempted to return to work less than one month after a court hearing in which he and his doctors produced evidence to establish his permanent disability.); *Brotherhood Railway Carmen of the United States and Canada v. Seaboard System Railroad*, PLB No. 3897 (1986) (Five days after withdrawing his appeal in a FELA case, the employee sought to return to his regular employment, despite his physician's sworn testimony that even with planned surgery "I doubt if he can perform heavy manual labor such as (is required when performing the duties of a carman)," and his attorney's statement that "everybody agrees that he is totally disabled from the work he really knows.").[14] In some cases, in addition to asserting that he was permanently disabled in a FELA action, the employee took the same position in an application for Railroad Retirement disability benefits. *E.g., United Transp. Union and Southern Pacific Transp. Co.*, PLB No. 4228 (1996).

In these instances, and numerous others, the railroads' position that the claimant was judicially estopped from reclaiming his prior job has been sustained. Arbitration panels have recognized that the significant factor in consideration of whether estoppel applies is what was con-

[14] These cases all arose out of efforts of employees to seek reinstatement in their jobs through invocation of rights under collective bargaining agreements, a matter which arises under the Railway Labor Act, 45 U.S.C. § 151 *et seq.* Disputes of this nature, over the interpretation or application of an agreement, must be brought before the National Railroad Adjustment Board. 45 U.S.C. § 153 First.

tended by the claimant, or on his behalf, in the FELA proceeding. *See United Transp. Union and Southern Pacific Transp. Co.*, PLB No. 4228 (1996). Moreover, it does not matter that the claimant himself did not testify that he had a permanent disability, where a doctor, economist and attorney, on the claimant's behalf, all took the position that the claimant could never return to his job. *See Brotherhood of Locomotive Engineers and Consolidated Rail Corp.*, Special Board of Adjustment No. 894 (1995).

Courts too have recognized that the doctrine of judicial estoppel should bar a railroad employee from asserting a legal right to return to the job after having represented in a prior judicial proceeding that he or she is unable to work due to a disability. *Lewandowski v. National Railroad Passenger Corp.*, 882 F.2d 815 (3rd Cir. 1989); *Morawa v. Consolidated Rail Corp.*, 819 F.2d 289 (6th Cir. 1987); *Jones v. Central of Georgia Ry. Co.*, 331 F.2d 649 (5th Cir. 1964); *Scarano v. Central R.R. of New Jersey*, 203 F.2d 510 (3rd Cir. 1953).[15] These courts have properly viewed with great skepticism the claims of former FELA plaintiffs seeking to return to their prior jobs after alleging a permanent disability. In *Scarano*, the court explained that

> [a] plaintiff who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later in the same court to contradict himself in an effort to establish against the same adversary a second claim inconsistent with his earlier contention. Such use of inconsistent positions would most flagrantly exemplify that playing 'fast and

[15] *See also Muncy v. Norfolk & Western Ry. Co.*, 676 F. Supp. 112 (S.D. W. Va. 1987) (Claimant estopped from pursuing a claim of discrimination on the basis of physical disability under the West Virginia Human Rights Act, as he maintained in a prior FELA action that he was permanently disabled from future employment with the railroad.); *Ellerd v. Southern Pacific R.R.*, 191 F. Supp. 716 (N.D. Ill. 1961); *Burbel v. Southern Pacific Co.*, 94 F. Supp. 11 (N.D. Cal. 1950).

> loose with the courts' which has been emphasized as an evil the courts should not tolerate.

203 F.2d at 513.

In *Lewandowski*, the plaintiff's attorney had argued to the jury that the plaintiff would never be able to work at a job that will pay what he was earning at the railroad. Further, the plaintiff remained off the job through the trial, but four days later "without embarrassment" attempted to reclaim his old job. The court explained that a claimant who advances a position in one proceeding cannot be heard to complain if that very same position is used to his disadvantage in a second proceeding. "[T]he critical issue is what the employee contended in the underlying proceeding, rather than what the jury found." 882 F.2d at 819. *See also Morawa* ("Morawa's trial brief asserted that he was disabled from the only type of employment for which he was suited and requested damages for the loss of his ability to earn a living from the time of his injury until his normal retirement at age 70. Such a position is clearly inconsistent with the position that Morawa now takes in the instant case." 819 F.2d at 289.)

While the traditional avenue employed by railroad workers for seeking reinstatement has been by assertion of a claim in contract, since enactment of the ADA some rail workers have attempted to utilize that statute as a means of regaining a job which they previously swore they could not perform. Courts have rebuffed these efforts where the inconsistency between the ADA claimant's current position and prior sworn statements about his ability to work warranted the application of judicial estoppel. *Terry v. Norfolk Southern Ry. Co.*, 948 F.Supp. 1058 (N.D. Ga.), *aff'd*, 103 F.3d 149 (11th Cir. 1996) (per curiam); *Berry v. Norfolk Southern Corp.*, 1995 U.S. Dist. LEXIS 10215 (W.D. Va. 1995); *McNeill v. Atchison, Topeka & Santa Fe Ry. Co.*, 878 F.Supp. 986 (S.D. Tex. 1995).

B. A Heightened Burden Is Properly Placed on a Claimant in Circumstances Like Those Presented in the Case Below

The Fifth Circuit's holding represents a balanced approach to the issue which arises when ADA claimants, seeking the right to employment, have previously represented under oath that they are entitled to Social Security disability benefits because a disability renders them unable to work anywhere in the economy. The Fifth Circuit's holding does not bar the pursuit of a remedy under ADA as the consequence of applying for disability benefits. Rather, through the imposition of a rebuttable presumption, it erects a safeguard against fraudulent claims and double recoveries. The Fifth Circuit acknowledged that there are differences between the SSA and ADA; that the former does not necessarily take into consideration whether the claimant could perform his or her job with a reasonable accommodation; and that the former allows a claimant to work for nine months while remaining eligible for benefits. 120 F.3d at 518. As a result, the court rejected a *per se* approach to judicial estoppel.

However, the Fifth Circuit appropriately recognized that despite the differences between SSA and ADA, a claim under oath that one is disabled, made for the express purpose of obtaining a pecuniary gain, should at least raise a presumption about that individual's ability to work. In such a circumstance, simply allowing the prior representation to come in as evidence under the traditional standard for evaluating a summary judgment motion creates an inappropriately low hurdle for the claimant. Since all the evidence proffered by the "non-movant is to be believed, and all justifiable inferences drawn in his favor," *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), such a rule would endow with a favored status an individual who has sought a government benefit based on a sworn declaration that he or she is incapable of working, but who later, in order to advance another right, swears he or she is capable of working.

Taking a cautious view of claimants who swear under oath that they are permanently disabled from working at any job, and then allege discrimination on the basis of a disability because they can work, does not prevent courts from according due regard to effectuating the purpose of the ADA. In appropriate cases, under the Fifth Circuit's ruling, a claimant who has applied for SSA disability benefits could successfully pursue an ADA claim simply by presenting evidence to rebut the presumption that their ADA claim, which is premised on the ability to perform the essential functions of a job, is precluded by their prior sworn statement that they are unable to work at any job. However, allowing such a claimant to go to a jury under the low bar imposed on a non-moving party to a summary judgment motion opens the judicial process to claims, tainted by bad faith, in which a claimant has simply changed his story to suit the needs of a pending case. Consistent with the rights of legitimate ADA claimants, court must maintain a reasonable degree of flexibility to preclude such claims.

In *McNeill v. Atchison, Topeka & Santa Fe Ry. Co.*, 878 F. Supp. 986 (S.D. Tex. 1995), though the court dismissed the plaintiff's ADA claim with prejudice, it did so duly recognizing the importance of preserving the humanitarian purposes of ADA.[16] The court noted that "Congress enacted the ADA to address legitimate societal wrongs, and to reenfranchise the physically challenged" and that "[t]he ADA was designed to remedy the serious injustices which persons with disabilities encounter each and every day, and its lofty goals should be supported by legitimate factual underpinnings." *Id.* at 991. However, confronted with a claimant who in a FELA case had previously "testified *under oath* that he was, in fact, *permanently* disabled," and whose "treating physicians also

[16] The court found the plaintiff's ADA claim to be time barred, but nonetheless went on to address its merits.

took the stand and represented to the Court, while under oath, that indeed Plaintiff was permanently disabled and *unable to return to work*," *id.* at 990, the court admonished that "[i]t was not the objective of the ADA to facilitate and ensure double recoveries for the exclusive benefit of a duplicitous Plaintiff or his misled or overeager counsel." *Id.* at 991.[17]

The Solicitor General's position in particular is troublesome because it attributes minimal significance to a claimant swearing that he or she both can and cannot work. The Solicitor General correctly points out that in addition to vindicating a private right, the ADA promotes a public interest by exposing and penalizing discrimination in the workplace. Brief of the United States at 21. As a result, the Solicitor General suggests that the doctrine of judicial estoppel would never have application in an ADA suit, and that an ADA claimant should always have the opportunity to prove the truth of his or her claims under the ADA. *Id.* at 28. This view fails to accord proper weight to the need to preserve the integrity of the judicial process.

While the purposes and goals of the ADA are no doubt important to both individuals and society at large, there is no reason to believe they cannot be effectively promoted even as courts maintain the flexibility to protect the integrity of the judicial process through the preclusion of suits in which the plaintiff seeks to benefit by plainly contradicting positions previously sworn to in another proceeding.[18] Even if a given ADA claimant could in fact

[17] While the court did not expressly use the word "estoppel," it is clear that the plaintiff's statements in a prior proceeding formed the basis for the dismissal of his ADA claim. *Cf. Terry supra*, where, with respect to an ADA claimant who had received disability benefits, the court stated that the "Plaintiff is estopped from asserting he is a qualified individual with a disability." 948 F. Supp. at 1062.

[18] It is clear that all other legitimate interests need not take a back seat to a claimant's ability to pursue an ADA case. *E.g.*,

perform the essential functions of a prior job, it would do violence to the integrity of the courts to permit such a claimant to use the courts to demand reinstatement at that job (and damages) after having sought substantial compensation on the basis of sworn statements that a disability rendered the claimant unable to ever do the job. Applying judicial estoppel is sometimes appropriate even at the price of disallowing a claimant the opportunity to prove the truth of a representation, when that representation is wholly at odds with a prior sworn statement. It may well be that the plaintiff in *McNeill* could have adduced evidence, sufficient to go to a jury, that he was capable of doing his old job, and possibly even to have convinced a jury of the same. To have allowed that opportunity, however, would be to make a mockery of the ADA.[19]

C. Flexibility to Apply Judicial Estoppel is Especially Important Where an ADA Claimant Previously has Sought Tort Compensation for Permanent Disability.

The Fifth Circuit's rebuttable presumption standard is an important judicial tool for dealing with inconsistent statements made when applying for disability benefits and in subsequent ADA suits. It is even more essential that courts maintain the flexibility to invoke estoppel where the claimant has previously represented in a tort action, like a FELA suit, that he is permanently disabled from returning to the job. Several factors strongly mitigate in

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Eckles v. Consolidated Rail Corp., 94 F.3d 1041 (7th Cir. 1996), *cert. denied*, 117 S.Ct. 1318 (1997) ("ADA does not required disabled individuals to be accommodated by sacrificing the collectively bargained bona fide seniority rights of other employees." 94 F.3d at 1051.)

[19] As the court chided, "absent a representation of outright Divine Intervention, which has not been proffered, the Court is left with the uncomfortable inference of outright fraud." 878 F. Supp. at 990.

favor of the application of judicial estoppel in that context. First, since FELA awards generally are paid in a lump sum, the FELA plaintiff will have collected up front all the compensation awarded for future wage loss.[20] Such a railroad employee who returns to work by virtue of a successful ADA suit will both be collecting a paycheck and earning interest on a sum of money already collected to compensate for the supposed inability to earn a paycheck.[21] Where an employee is reinstated at a position and already has been awarded substantial compensation for lost future wages, there is no practical means of preventing a windfall.[22]

Second, the disability beneficiary, successful in an ADA action, would have received a remedy from two different sources: the public treasury and the employer. On the other hand, the FELA plaintiff who is successful in a subsequent ADA action will receive two remedies for the same disability, *in both cases from the employer*. Thus, not only is a windfall realized by one party, a double penalty is visited on the other.

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[20] On the other hand, if a recipient of disability benefits is found to be no longer disabled, benefits may eventually be terminated. 42 U.S.C. § 423(f). *Mables v. Sullivan*, 812 F. Supp. 886 (C.D. Ill. 1993); *See also Reese v. Railroad Retirement Board*, 906 F.2d 355 (8th Cir. 1990). However, even the Solicitor General notes the practical difficulties of recovering overpayments of disability benefits. Brief of United States at 29, n.10.

[21] *See Scarano supra.* ("Not only does plaintiff found successive claims on inconsistent facts, but he now seeks a duplicating recovery . . ." 203 F.2d at 514.); *Morawa supra* (If plaintiff "were permitted to take a second position . . . inconsistent with his prior position of permanent disability, he would be duplicating his recovery." 819 F.2d at 289.)

[22] The court in *McNeill* wryly offered that if the plaintiff "is willing to forfeit the jury verdict, and return the $305,000, this Court would eagerly direct its attention to any injustice he may have suffered. 878 F. Supp. at 991.

Finally, there are no precise definitions under FELA regarding disability (as there are under the SSA disability regulations). Thus, when a FELA plaintiff, or witnesses on his behalf, for the purpose of convincing a jury to award a large sum of money to compensate for future lost earnings, swear that the plaintiff can never work again, the plaintiff ought to be held to the plain consequences of such statements. Where such an individual later appears as an ADA plaintiff, there is no basis for claiming that because of some unique definition the prior sworn statements are somehow consistent with the status of a "qualified individual with a disability."

CONCLUSION

On the basis of the foregoing, *amicus curiae* respectfully submits that the judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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